STATE OF MICHIGAN

COURT OF APPEALS

ERIC SMITH, Personal Representative of the Estate of DANNY RAY MARROW,

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT PUBLIC LIGHTING DEPARTMENT, DETROIT EDISON COMPANY, and SIDNEY BRAGG,

Defendants-Appellees,

and

ROBERT G. SHEPHERD, GEORGE CASCOS, ISAAC B. POINTS, GLORIA J. JACKSON, KEN PARKER, LARRY COOPER, JAMES CURRY, JAMES TULLIS, TOM BAILEY, ERIC BOONE, and ROBERT SASNOWSKI,

Defendants.

UNPUBLISHED
September 19, 1997

No. 189278
Wayne Circuit
LC No. 93-320774-NO

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Plaintiff Eric Smith, as personal representative of the estate of Danny Ray Marrow, appeals as of right from the order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand.

Following a severe thunderstorm, a street light wire owned and maintained by the Detroit Public Lighting Department (DPLD) fell to the ground and landed on a public sidewalk and a fence belonging to James Tullis, Marrow's neighbor. Marrow stood near the fence in order to keep people away from

the sparking wire. While Marrow was standing near the wire, a police officer whom plaintiff contends was defendant Bragg arrived at the intersection. The officer appeared to notify dispatch of the downed wire and left the scene. Thereafter, Marrow was electrocuted when he came in contact with the wire. According to a letter written by the DPLD supervising inspector of overhead lines and safety, Robert Shepherd, the DPLD did not energize their street lighting wires during the storm. However, days after the storm, the DPLD found street light wires wrapped with Detroit Edison (Edison) wires near the area where Marrow died. Shepherd stated in the letter that being wrapped with Edison wire would have energized the DPLD wire.

Plaintiff contends that the trial court erred in granting summary disposition to defendant Bragg. We disagree.

The trial court held that Bragg was entitled to summary disposition because he owed no duty to Marrow under the public-duty doctrine. The public-duty doctrine insulates police officers from tort liability for the negligent failure to provide police protection unless an individual satisfies the special-relationship exception. *White v Beasley*, 453 Mich 308, 316; 552 NW2d 1 (1996), citing *Cuffy v City of New York*, 69 NY2d 255, 260; 513 NYS2d 372 (1987).

In *White*, our Supreme Court adopted the special relationship test set forth by the New York Court of Appeals in *Cuffy, supra*. The elements of the *Cuffy* test are:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
>
> (2) knowledge on the part of the municipality's agent that inaction could lead to harm;
>
> (3) some form of direct contact between the municipality's agents and the injured party; and
>
> (4) that party's justifiable reliance on the municipality's affirmative undertaking. [*White, supra* at 320, quoting *Cuffy, supra*, at 260.]

Plaintiff has failed to allege facts indicating that the decedent justifiably relied on any affirmative action taken by Bragg. Plaintiff alleges that a police officer, who plaintiff asserts was Bragg, stopped his patrol car at the intersection. Marrow informed the officer that a power line had fallen and asked the officer to notify the proper authorities. The officer "appeared to radio the downed wire in to dispatch thereby notifying Defendant, City of Detroit," and then left the scene. The only "affirmative duty" even arguably assumed by the officer was to notify the proper authorities. There are no allegations indicating that Marrow justifiably relied on that affirmative undertaking. Therefore, plaintiff has failed to allege facts sufficient to satisfy the special-relationship exception, and summary disposition was properly granted in favor of defendant Bragg.

Next, plaintiff contends that the trial court erred in dismissing his trespass-nuisance and highway defect claims against the city of Detroit and the DPLD. The DPLD is not a separate

legal entity against which a tort action can be directed. *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987). Accordingly, plaintiff's claims will be analyzed with regard to the city only.

Plaintiff relies on the trespass-nuisance exception to governmental immunity[1] and claims that the downed wire intruded on private property and a public sidewalk.

> Trespass-nuisance is "defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage." To establish trespass-nuisance the plaintiff must show "condition (nuisance or trespass), cause (physical intrusion), and causation or control (by government)." [*Continental Paper Co v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996), quoting *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988).]

Plaintiff lacks standing to assert a trespass-nuisance claim based on the intrusion of the wire on private property in which Marrow had no interest. In order to recover for trespass, the plaintiff must have title to the property which has been subject to an unauthorized entry. *Difronzo v Port Sanilac*, 166 Mich App 148, 155; 419 NW2d 756 (1988). Similarly, under the traditional doctrine of nuisance, the plaintiff must have had some interest in the land subject to the interference. This required that the plaintiff be a freeholder, lessee or occupant of the property. *Adkins v Thomas Solvent Co*, 440 Mich 293, 307-308; 487 NW2d 715 (1992); see also *Hadfield supra* at 163-164; (Brickley, J.) discussing *Herro v Chippewa Co Road Comm'rs*, 368 Mich 263; 118 NW2d 271 (1962). The complaint does not allege that plaintiff had an interest in or was an occupant of the property where the wire fell. Accordingly, plaintiff lacked standing to assert a trespass-nuisance claim against the city for the alleged intrusion of the wire on private property.

The trespass-nuisance claim also fails to the extent that it is based on the intrusion of the wire on a public sidewalk. To constitute a viable trespass-nuisance claim, the injury must have been sustained outside of the governmental defendant's own premises. *Ward v Franks Nursery & Crafts, Inc*, 186 Mich App 120, 127; 463 NW2d 442 (1990). In the instant case, the injury allegedly occurred on a public sidewalk within the city of Detroit. Because the defendant city had authority over the sidewalk, plaintiff's reliance on the trespass-nuisance exception is without merit. *Id.; s*ee also *Li v Feldt (After Second Remand)*, 439 Mich 457, 473-474; 487 NW2d 127 (1992) (Cavanagh, CJ.); *Pound v Garden City School District*, 372 Mich 499, 502; 127 NW2d 390 (1964).

Plaintiff next argues that the city may be liable for Marrow's death under the public highway exception to governmental immunity. The public highway exception, MCL 691.1402; MSA 2.996(102), permits actions for injuries suffered on highways over which a governmental agency has jurisdiction. The scope of immunity is broad, and the exceptions are narrowly drawn. *Chaney v Dep't of Transportation*, 447 Mich 145, 154; 523 NW2d 762 (1994).

Plaintiff's claim does not fall within the highway exception to governmental immunity. Plaintiff alleged that the downed wire created a defective and dangerous condition on the sidewalk such that it

was not reasonably safe for public travel. Plaintiff is correct that municipalities are liable for defective construction or maintenance of sidewalks. MCL 691.1402; MSA 3.996(102); *Messecar v Garden City*, 172 Mich App 519, 522; 432 NW2d 311 (1988). In order to recover, a plaintiff must show that the governmental agency having jurisdiction over the highway knew or should have known of the defect and had a reasonable time to repair the defect before the injury took place. MCL 691.1403; MSA 3.996(103); *Peters v Dep't of State Highways*, 400 Mich 50; 252 NW2d 799 (1977). In *Schroeder v Dep't of Transportation*, 159 Mich App 396; 405 NW2d 884 (1987), the plaintiff was injured when his motorcycle collided with a car that was parked partly in the highway following an earlier collision. This Court held that as a matter of law, a twenty to thirty minute period between the first collision and the plaintiff's injury was not a reasonable time within which the defendant could have been notified and removed the disabled car. *Id.* at 400. In the present case, plaintiff presented the affidavit of a witness who stated that the wire was down for at least an hour before Marrow was injured. Even if notice to the police officer who arrived on the scene was held to be notice to the city, we conclude that as a matter of law, the city did not have reasonable time to remedy the defect. Because plaintiff failed to show that the city knew or should have known of the defect and had a reasonable time to repair the defect before the injury took place, summary disposition was properly granted in favor of the city on plaintiff's "defective highway" claim.

Finally, plaintiff contends that the trial court erred in granting summary disposition in favor of Detroit Edison. We agree.

In an affidavit attached to plaintiff's response to Edison's motion for summary disposition, plaintiff's expert, John St. Clair, stated that the power lines belonging to the DPLD and Detroit Edison had excessive sag and were in violation of the National Electrical Safety Code with regard to the spacing of conductors. According to St. Clair, the excessive sag was "the cause of the power line in question coming down." He also explained that "given the spacing and distance of the lines in question, excessive sag of these electrical lines allowed them to come into contact with each other, especially in windy weather resulting in arcing or wrapping which can burn through the lines." St. Clair concluded that the wrapping of the DPLD and Edison lines existed before the incident and that the wrapping energized the fallen DPLD line. St. Clair opined that the sag should have been observed if Edison employees inspected the lines in question.

A power company has a duty to reasonably inspect and repair its power lines in order to discover and fix hazards and defects. *Schultz v Consumers Power Co*, 443 Mich 445, 451; 506 NW2d 175 (1993). Contrary to Edison's arguments on appeal, the evidence presented by plaintiff was adequate to create a genuine issue of material fact regarding the alleged defect in Edison's lines and whether Edison breached a duty to inspect and repair its wires.

The trial court held that Marrow was the sole proximate cause of his injury. We conclude that reasonable minds could differ on the issue whether Edison's alleged negligent failure to inspect and repair its lines was a proximate cause of the injury, and therefore, summary disposition should not have been granted in favor of Edison on this basis. Proximate cause means such cause as operates to produce particular consequences without the intervention of any

independent, unforeseen cause, without which the injuries would not have occurred. *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). When a number of factors contribute to producing injury, a defendant's negligence will not be considered a proximate cause unless it was a substantial factor in bringing about the injury. *Poe v Detroit*, 179 Mich App 564, 576; 446 NW2d 523 (1989).

On the basis of the evidence presented by plaintiff, reasonable minds could differ regarding whether Edison's failure to inspect its lines was a substantial factor in bringing about Marrow's injury. According to St. Clair's affidavit, the excessive sagging of the Edison and DPLD lines caused the DPLD line to fall and resulted in the wrapping of the wires that energized the DPLD line that had been "de-energized" by the DPLD during the storm. Given this evidence and St. Clair's opinion that the sag should have been observed if Edison employees inspected the lines, reasonable minds could conclude that the failure to inspect and repair was a substantial factor in Marrow's death.

Edison argues that Marrow's negligence was an intervening, superseding cause. Even if a defendant's negligence was a substantial factor in bringing about the injury, the defendant will be relieved from liability if there was an intervening, superseding cause. *Heitsch v Hampton*, 167 Mich App 629, ; 423 NW2d 297 (1988). However, an intervening act will not sever the connection between a defendant's negligence and a plaintiff's injury if the intervening act was reasonably foreseeable. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985); *Scott v Allen Bradley Co*, 139 Mich App 665, 672; 362 NW2d 734 (1984). Where there could exist a reasonable difference of opinion as to the foreseeability of a particular risk, as to the reasonableness of a defendant's conduct with respect to that risk, or as to the character of the intervening cause, the issue should be resolved by the trier of fact. *Id.* We conclude that there could be a reasonable difference of opinion whether the asserted intervening act (Marrow's attempt to move the fallen power line) was foreseeable, and therefore, the trier of fact should decide the issue. Accordingly, the trial court erred in granting summary disposition in favor of Detroit Edison.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] MCL 691.1407(1); MSA 3.996(107)(1) provides that all governmental agencies shall be immune from tort liability where the agency is engaged in the exercise or discharge of a governmental function. Plaintiff does not dispute that the City of Detroit was engaged in the exercise of a governmental function with regard to its operation and maintenance of the street lighting system.